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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MARIA ESPINOZA, Plaintiff and Appellant, v. NORTHGATE GONZALEZ, LLC, Defendant and Respondent.	B287134 (Los Angeles County Super. Ct. No. BC600673)

APPEAL from a judgment of the Superior Court of Los Angeles County. Patricia Nieto, Judge. Affirmed.

Raymond Ghermezian, for Plaintiff and Appellant.

Wesierski & Zurek, LLP, Brent Gerome, and Lynne Rasmussen, for Defendant and Respondent.

* * * * * *

A grocery store's customer sued the store after she slipped in a puddle of clear liquid while shopping. The trial court granted summary judgment to the store, and the customer appeals. We conclude that there are no triable issues of fact as to the store's liability, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

The following facts are undisputed.

On August 6, 2015, Maria Espinoza (plaintiff) was shopping at a grocery store owned by Northgate Gonzalez, LLC (the grocery store or the store). In the aisle in front of the store's meat counter, plaintiff slipped and fell onto her buttocks and arm. In the place where she fell, plaintiff subsequently saw a puddle of clear liquid. Although there was some dispute over the puddle's size and contours, with plaintiff saying it was 18 inches across with no surrounding droplets and a store employee saying it was 3 or 4 inches across with adjacent "little drops" leading to the vegetable department, no one knew how the liquid got there or how long it had been there prior to plaintiff's slip and fall.

Eleven minutes before plaintiff's slip and fall, one of the store's boxboys had walked through the same aisle.) He was looking for any spills and pushing a wide cloth broom. The store had set up 30 checkpoints along a predesignated route inside the store, and required the boxboy to walk that route at least twice an hour looking for—and, if necessary, cleaning up—any spills. To do so, he was equipped with a cloth broom and with paper towels.

One of the store's surveillance cameras was trained on the aisle. The camera showed the boxboy sweeping the aisle and plaintiff's fall 11 minutes later. In between those two events,

several other customers carrying foodstuffs walked up and down the aisle.

II. Procedural Background

In November 2015, plaintiff sued the grocery store for (1) negligence and (2) premises liability.[1]

The store moved for summary judgment.

Along with her opposition, plaintiff submitted a declaration by a licensed civil engineer and "safety and liability expert." The expert opined that the grocery store had maintained its premises in a negligent manner because (1) the boxboy had "exacerbate[d]" the spill that was already there by using a type of broom that "spread[]" liquids rather than "absorb[ed]" them, and (2) the material the store used for flooring was "inherently improper" because its slip resistance was insufficiently low when it was wet. In support of his first opinion, the expert also opined that the spill was "most likely" there when the boxboy did his sweep because the video did not "appear" to depict anyone else spilling liquid during the 11 minutes between the boxboy's sweep and plaintiff's slip and fall.

After the store filed a reply and the trial court held a hearing, the court granted summary judgment to the store. Citing *Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200 (*Ortega*), the court explained that the store could be liable for plaintiff's injuries only if the store had "actual or constructive" "notice" of the "specific spill that caused the incident." The court ruled there was no evidence that the store had *actual* knowledge of the spill.

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1 Although the body of plaintiff's complaint does not distinguish between the two claims, they are separately articulated in the caption.

The court also ruled that there were no triable issues of material fact as to whether the store had *constructive* notice of the spill because it was undisputed that the store had a policy of regularly inspecting the aisle for spills and, pursuant to that policy, had inspected that aisle just 11 minutes before plaintiff's slip and fall. The court then explained why neither of the two opinions offered by plaintiff's expert created a triable issue of fact. The expert's opinion that the store's "sweeping procedures" were "inadequate" due to the boxboy's use of an improper broom did not create a triable issue of fact because those inadequacies were relevant only if there was a liquid spill to "exacerbate" in the first place, and the expert's opinion that there was a spill prior to the boxboy's inspection was "mere speculation." The expert's opinion that the store's flooring was "inherently" dangerous did not create a triable issue of fact because case law had already rejected the notion that store owners "must install slip resistant flooring."

Following the entry of judgment, plaintiff filed this timely appeal.

DISCUSSION

Plaintiff argues that the trial court erred in granting summary judgment.

I. Summary Judgment Law

Summary judgment is appropriate only when the moving party shows that the plaintiff is unable to raise a "triable issue of material fact" as to one or more elements of her claims. (Civ. Proc. Code, § 437c, subds. (a)(1), (c), (o)(1)[2]; *Aguilar v. Atlantic*

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2 All further statutory references are to the Civil Procedure Code unless otherwise indicated.

Richfield Co. (2001) 25 Cal.4th 826, 850 (*Aguilar*).) In litigating a motion for summary judgment, the moving party bears the "initial burden" of producing evidence "showing of the nonexistence of any triable issue of material fact"; if the moving party does so, then the burden shifts to the plaintiff to produce evidence showing one or more triable issues of material fact. (*Aguilar*, at p. 850.) In evaluating the evidence submitted by both parties, the court must "strictly construe[]" the affidavits of the moving party, "liberally construe[]" those of the plaintiff, and resolve any doubts against summary judgment. (*Miller v. Bechtel Corp.* (1983) 33 Cal.3d 868, 874 (*Miller*).) However, the court may only consider "admissible evidence" and inferences "'reasonably deducible from [that] evidence." (§ 437c, subd. (d); *Miller*, at p. 874; *Advent, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA*, (2016) 6 Cal.App.5th 443, 459.) Because "[s]peculation . . . is not evidence" (*Aguilar*, at p. 864), speculation cannot create a triable issue of material fact. We independently review a trial court's grant of summary judgment. (*Hampton v. County of San Diego* (2015) 62 Cal.4th 340, 347.)

II. Premises Liability Law

"[A] store owner is not an insurer of the safety of its patrons." (*Ortega*, *supra*, 26 Cal.4th at p. 1205; *Girvetz v. Boys' Market* (1949) 91 Cal.App.2d 827, 829 (*Girvetz*).) Consequently, a customer who is injured by a dangerous condition on a store owner's property may recover damages against the owner only if the owner was somehow negligent. (*Ortega*, *supra*, 26 Cal.4th at p. 1205; *Louie v. Hagstrom's Food Stores, Inc.* (1947) 81 Cal.App.2d 601, 606; see generally Civ. Code, § 1714, subd. (a).) This requirement exists whether a claim is labeled as one for "negligence" or one for "premises liability." (*Kesner v. Superior*

Court (2016) 1 Cal.5th 1132, 1158 [noting that elements for both claims "are the same"].)

A store owner's negligence may be proven by showing that the owner did not "exercise reasonable care to keep the premises reasonably safe for patrons" (*Peralta v. Vons Companies, Inc.* (2018) 24 Cal.App.5th 1030, 1035), either because (1) the owner itself created a dangerous condition on the premises (*Henderson v. Progressive Optical System* (1943) 57 Cal.App.2d 180, 184), or (2) someone else created a dangerous condition, and the owner acted unreasonably by not remedying that condition or warning its customers about it (*Girvetz*, *supra*, 91 Cal.App.2d at p. 829). An owner acts unreasonably only if it "had [actual or constructive] notice of the [dangerous condition] in sufficient time to correct it" or warn about it (*Ortega*, *supra*, 26 Cal.4th at pp. 1203, 1206); it is not enough to show that the dangerous condition existed and that the plaintiff was injured by it (*Girvetz*, at p. 829; *Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403, 432).

Where, as here, there is "no evidence of the source of the dangerous condition or the length of time it existed," a store owner's "failure to inspect the premises within a reasonable period of time" creates an "inference that the defective condition existed long enough for a reasonable person exercising ordinary care" to have constructive notice of that condition (which, in turn, constitutes evidence that the owner breached its duty of care). (*Ortega*, *supra*, 26 Cal.4th at p. 1203; *Moore v. Wal-Mart Stores, Inc.* (2003) 111 Cal.App.4th 472, 477; see also *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 303 [applying same inference to dangerous conditions on property owned by public entities].) What is a "reasonable period of time"

depends on the "unique circumstances" of each case (*Ortega*, *supra*, 26 Cal.4th at p. 1207), although that period is likely to be shorter for grocery stores whose customers "are invited to inspect, remove and replace goods on shelves" because such "'disarranging [of] merchandise'" is more likely to "creat[e] potentially hazardous conditions." (*Id.*, at p. 1205, quoting *Bridgman v. Safeway Stores, Inc.* (1960) 53 Cal.2d 443, 448.)

III. Analysis

Because plaintiff proffered no evidence (and did not argue to the trial court) that the store had *actual* notice of the spill on which plaintiff slipped and fell, the propriety of summary judgment in this case turns on whether there is a triable issue of fact as to the store's *constructive* notice of the spill.

A. *Grocery store's initial burden*

We independently agree with the trial court that the grocery store carried its initial burden of establishing that it had no constructive notice of the spill, and thus did not breach its duty of care to plaintiff. It is undisputed that no one knew how the liquid was spilled onto the aisle or how long the spill had been there prior to plaintiff's slip and fall. It is also undisputed that the store regularly inspected its premises, and had inspected the very aisle at issue in this case just 11 minutes before plaintiff's slip and fall. This satisfies the store's initial burden: Where a "store owner has taken care in the discharge of its duty[] by inspecting its premises in a reasonable manner, then no breach will be found even if a plaintiff does suffer injury." (*Ortega*, *supra*, 26 Cal.4th at p. 1211.)

B. *Plaintiff's consequent burden*

Plaintiff offers two reasons why she has carried her consequent burden of showing a triable issue of material fact; her reasons track her expert's analysis.

1. *Plaintiff's exacerbation-of-spill theory*

Plaintiff contends that the boxboy's sweeping—by virtue of using the wrong broom—made the spill worse, such that the store "exacerbate[d]" the dangerous condition and was negligent for doing so. The necessary premise of this contention is that the spill was in the aisle *at the time the boxboy swept the aisle*. But plaintiff has offered only one piece of evidence that would support this premise—namely, her expert's opinion that the spill was "most likely present" when the boxboy did his sweep because "it doesn't appear," from the expert's viewing of the video, "that there was any spill which occurred in the subject area" in the 11 minutes between the boxboy's sweep and plaintiff's slip and fall.

This opinion does not raise a triable issue of fact. To begin, the opinion was excluded. Courts certainly have the power to "exclude[] . . . expert opinions that rest on guess, surmise or conjecture." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 770.) Plaintiff challenges this exclusion, but her challenge is ultimately beside the point because even if the opinion should not have been excluded from evidence, an expert opinion that is based on speculation, surmise or "assumptions of fact . . . without evidentiary support" does not raise a triable issue of material fact. (*Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 743; *Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1110.) Plaintiff's expert's opinion that the liquid was on the floor at the time of the boxboy's sweep is based solely on the video, but the video does not depict whether

a spill occurred during the 11 minutes between the sweep and the fall—one way or the other. The video does not show anyone pouring a pitcher of liquid onto the patch of floor where plaintiff slipped and fell, but it does show several customers with foodstuffs capable of dripping liquids walking over that very same patch of floor. The expert's opinion that the video showed that the spill was not made during the 11-minute window is accordingly without factual support and based on speculation. Although we resolve any doubts against summary judgment, we cannot infer evidence from the absence of evidence, and the opinion does not raise a triable issue of material fact. (Accord, *Ortega*, *supra*, 26 Cal.4th at p. 1206 ["[S]peculation and conjecture with respect to how long a dangerous condition has existed are insufficient to satisfy a plaintiff's burden"].)

Plaintiff offers three responses. She asserts that the trial court impermissibly weighed the expert's opinion when it concluded that it was speculative. Although courts may not weigh evidence when deciding motions for summary judgment (e.g., *Murillo v. Rite Stuff Foods* (1998) 65 Cal.App.4th 833, 841, superseded by statute on other grounds in *Salas v. Sierra Chemical Co.*, (2014) 59 Cal.4th 407), this anti-weighing principle does not obligate a court to give weight to expert opinions that are speculative. For the same reasons, the absence of a competing expert opinion from the grocery store is of no moment. Plaintiff next asserts that the question of constructive notice is typically a question of fact for the jury (*Ortega*, *supra*, 26 Cal.4th at p. 1205; *Carson v. Facilities Development Co.* (1984) 36 Cal.3d 830, 842-843), thereby making it inappropriate to grant summary judgment. This is true, but ultimately irrelevant because constructive notice is not *inevitably* a question of fact: Summary

judgment is still appropriate where the "facts . . . are undisputed" or where "reasonable minds can come to but one conclusion." (*Ortega,* at p. 1205; *Gonzalez v. Mathis* (2018) 20 Cal.App.5th 257, 273-274.) Here, plaintiff's first theory of breach turns on the existence of the spill at the time the boxboy conducted his sweep; because all plaintiff offers on this factual issue is the speculative opinion of her expert, reasonable minds can come to but one conclusion. Plaintiff further asserts that the trial court's ruling effectively re-writes premises liability law by requiring her to prove actual notice. The ruling does no such thing; it merely concludes that she did not establish a triable issue of fact as to constructive notice.[3]

2. *Plaintiff's inherently dangerous flooring theory*

Plaintiff contends that the grocery store was negligent because the flooring it installed was inherently dangerous when wet (and, in particular, more dangerous than other flooring options might have been). This contention is an attack on the store's "mode of operation"—that is, an attack on the store's "choice of a particular mode of operation [here, in electing what type of flooring to install] and not [the] events surrounding the plaintiff's accident." (*Moore*, *supra*, 111 Cal.App.4th at p. 478.) Under California law, however, "a store owner's choice of a particular 'mode of operation' does not eliminate a slip-and-fall plaintiff's burden of proving the owner had knowledge of the dangerous condition that caused the accident." (*Id.* at p. 479; accord, *Rodgers v. Stater Bros. Markets* (S.D.Cal., May 1, 2018,

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3 In light of this conclusion, we have no occasion to reach the grocery store's alternative argument that its customary inspection practice is reasonable *per se*.

16cv2614-MMA (MDD)) 2018 U.S.Dist. Lexis 73622, at *19-21.) This rule enforces California's broader policy, noted above, that store owners are not to be the insurers of their customers irrespective of the circumstances of a particular incident. (See *Ortega*, *supra*, 26 Cal.4th at p. 1205.) Plaintiff's "mode of operation" theory is therefore legally invalid and cannot provide a basis for liability.

DISPOSITION

The judgment is affirmed. The grocery store is entitled to its costs on appeal.

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_____, J.
HOFFSTADT

We concur:

_____, P.J.
LUI

_____, J.
ASHMANN-GERST